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80-850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ELIE JONES, WARDEN,
STONE MOUNTAIN CORRECTIONAL
INSTITUTION,

Appellant

versus

BOBBY H. HELMS

Appellee.

On Appeal from the United States Court of Appeals

for the Fifth Circuit

MOTION TO AFFIRM

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MOTION TO AFFIRM

I. Jurisdiction

Appellate jurisdiction is properly in this Court under 28 U.S.C. 1254(b) and the appeal is timely under Rules 10 and 12 of this Court.

II. Why This Court Should Summarily Affirm

A.

Georgia Code Ann 74-9902 makes it a crime for a parent to abandon his child within the state. It divides all parents who are subject to falling under its jeopardy into two classes for purposes of punishment if ever convicted. Those who remain within the state, at least short of a third conviction, are subject to misdemeanor confinement for 12 months. Those who leave the state are subject to felony imprisonment for up to three years.

From the standpoint of any parent's jeopardy under the statute, the classification turns directly upon the exercise of the right to interstate travel, a right secured by the Constitution, United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966), Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). Under well-settled constitutional principles, the classification is therefore subject to "strict scrutiny" under the Equal Protection Clause. That is, the state is obliged to demonstrate that its infringement of the right to travel is reasonably necessary in order to advance some substantial public interest, Shapiro v. Thompson, supra, Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

There is no question that Georgia has a substantial interest in discouraging parents from abandoning their children within her borders, conduct which threatens their welfare, overburdens their remaining custodian, and can possibly make them public charges. Nor is there any real quarrel with the proposition that fleeing her jurisdiction could aggravate the offense and make it more difficult for Georgia to secure her interest.

The problem under the strict scrutiny test is whether enhancing the potential penalty indiscriminately for parents who leave the state sweeps too broadly and "unnecessarily burden[s] or restrict[s] constitutionally protected activity," Dunn v. Blumstein, 405 U.S. 333, 343, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Given the constitutional nature of the right implicated, the question is whether the statute is precisely enough tailored to serve the state's legitimate interests, with minimal infringement of the right to travel, Zablocki v. Redhail, 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

With respect to these aspects of the inquiry, the constitutional definciency of the law is that "departure from the state, which...increase[s]...the potential punishment from a misdemeanor

to a felony, need not be accompanied by any specific intent to flee nor intent to avoid prosecution" (Jurisdictional Statement, p. 13). Thus a parent who leaves Georgia for the most innocent or laudable reasons--even to secure training or work so that he can support his family--risks being treated like a fugitive who leaves to compound his crime. The motives of both are irrelevant. Both are felons if convicted of child abandonment.

In effect, the Statute discourages any parent from leaving the state. This is neither reasonable, given the constitutional nature of the right involved, nor necessary, given the state's legitimate concerns.

Georgia could easily secure her interests with constitutional precision by affixing a particular culpable intent to any departure from the state, and this would not be an unreasonable restriction of the right to travel. Cf., Barrow v. Owen, 89 F.2d 476 (5th Cir 1937). See Helms v. Jones, 621 F.2d 211, 213 (5th Cir 1980). As noted below, id. at 212, other less constitutionally onerous means are also available to secure her interests in the event a parent has left the state, irrespective of his motives. See Georgia Code Ann 99-9A (URESA).

What Georgia may not do is make the simple exercise of the right to travel, for whatever reason or motive, the distinguishing element of a felony. It is simply beyond any state's power to attach a penalty to a constitutional right in this manner, Harmon v. Forssenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965), or so needlessly chill its exercise, United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

B.

Georgia has not mounted any serious defense of the statute against strict scrutiny, in effect conceding that it cannot be done. Her position is that the "rational connection" test is the appropriate standard for its examination.

To evade the application of the strict scrutiny which the Court of Appeals found to be clearly mandated, here on appeal Georgia has invoked the rationale of her Supreme Court in Garren v. State, 245 Ga. 323, 264 S.E.2d 876 (1980), "that a person who is charged with the commission of a crime within the state does not have a constitutionally protected right of travel" (Jursidictional Statement, p. 15).[-1)]

Further, her argument runs, the Court below erred when it "failed to recognize that the right to interstate travel is not an absolute right, and [that] before strict scrutiny is applicable there must be some unreasonable infringement of that protected right" (Jurisdictional Statement, p. 17). Finally her position is that the enhanced penalty is not unreasonable because it affects only those who have "wilfully and voluntarily decline[d] to provide the means for their children to gain the bare necessities of life." (id., p. 2).

While it is true that the rights of those who stand accused of crimes, including the right to travel freely, may reasonably be restricted, e.g., United States v. Cook, 428 F.2d 460 (5th Cir. 1970), and that no one has a constitutional right to be a fugitive, Garren v. State, supra at 325, the facial vice of Georgia Code Ann. 74-0092 is that it is not so limited. It was a mistake for the Supreme Court of Georgia to have sustained it as if it were. The statute plainly reaches parents who are not necessarily fugitives, who never intended to be, and who have simply exercised their rights to travel. It discourages out-of-state travel by any parent.

-1) In Garren, the parent was formally charged before he left the state. The Appellee was not charged until after he left Georgia "in search of vocational training opportunities," Helms v. Jones, supra at 212, Jurisdictional Statement, pp. 9-10.

Few constitutional rights are absolute,-2) but that fact hardly exempts from strict scrutiny any statute which directly and significantly infringes upon such a right. See Zablocki v. Redhail, supra at 386, Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). If it did, the test could hardly be invoked at all.

Finally, the statute is not reasonable simply because only a few convicted criminals may ever actually suffer its enhanced penalty. In the first place, even from such a narrow perspective of the law's impact, even those ultimately adjudged guilty are entitled among themselves to the equal protection of the laws. The disparity of treatment between those who left and those who stayed, for intrinsically the same offense, is no less unreasonable, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

But more importantly, the statute's impact and its reasonableness cannot be viewed as if it were restricted just to the guilty. It chills every parent's right to leave Georgia or to reside elsewhere. It reaches out indiscriminately to brand as a potential felon any parent who travels outside of the state for any reason. It does so simply because they had the temerity or need to exercise a right vouchsafed by the Constitution.

III. Conclusion

Under the settled precedents in this Court, there is no substantial or novel question involved in this appeal which warrants further argument. This Court should summarily affirm the judgement below.

James C. Bonner, Jr.
JAMES C. BONNER, JR.
Counsel for the Appellee

-2) This Court has characterized the right of interstate travel as "virtually unqualified," Califano v. Torres, 435 U.S. 1, 4n., 98 S.Ct. 906, 55 L.Ed.2d 65 (1978).

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Appellant

versus

BOBBY H. HELMS,

Appellee

On Appeal from the United States Court of Appeals

for the Fifth Circuit

CERTIFICATE OF SERVICE

I, JAMES C. BONNER, JR., A member of the Bar of this Court, hereby certify that on this 19th day of December 1980, I mailed first class a copy of the attached Motion for Leave to Proceed in Forma Pauperis to the counsel for the Appellant, Assistant Attorney General Nicholas Dumich, 132 State Jducial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334

James C. Bonner, Jr.

JAMES C. BONNER, JR.
Attorney for Appellee

UNIVERSITY OF GEORGIA SCHOOL OF LAW
PRISONER LEGAL COUNSELING PROJECT
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(404)542-4241

5. He has no dependents since his child is in foster care.

6. He has not previously moved for or been granted leave to proceed in forma pauperis.

Bobby H. Helms
BOBBY H. HELMS

Sworn to and subscribed
before me this 12
day of December,
1980.

Angela Akins
NOTARY PUBLIC

Notary Public, State of Florida at Large
My Commission Expires May 24, 1984
Bonded Thru Troy Fain Insurance Inc.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Bobby H. Helms, by counsel, respectfully moves this Court for leave to file the attached motion to affirm, and to proceed thereafter, in forma pauperis without prepayment of the fees and costs normally required.

His affidavit of poverty is attached.

James C. Bonner, Jr.

JAMES C. BONNER, JR.
COUNSEL FOR THE APPELLEE

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James C. Bonner, Jr.

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Counsel for Appellee

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IN THE SUPREME COURT

OF

THE UNITED STATES

ELIE JONES, WARDEN,	:
	:
STONE MOUNTAIN CORRECTIONAL INSTITUTION,	:
Appellant	:
	:
	:
	:
VS.	:
	:
	:
	:
BOBBY H. HELMS,	:
	:
Appellee	:

AFFIDAVIT OF POVERTY

Bobby H. Helms, being first duly sworn, identifies himself as the Appellee in the above-styled case and states upon his oath that because of his poverty he is unable to pay the costs of printing his motion to affirm though he believes in good faith that he is entitled to the redress he has won below.

He further states upon his oath:

1. That he is employed as a truck driver with the Hardrives Company, 847 N.W. 8th Avenue, Ft. Lauderdale, Florida 33311, where, before taxes and other deductions, he earns $190.00 each week.

2. Within the last 12 months, he has had no other income from any other source.

3. He has no checking account but he does have a modest ($150) savings account.

4. His only significant personal property is a 1971 Chevrolet automobile worth approximately $300.00.